



In the
Supreme Court of the United States

OCTOBER TERM, 1992

EL VOCERO DE PUERTO RICO
(CARIBBEAN INTERNATIONAL NEWS CORP)
JOSE A. PURCELL,
PETITIONERS,

v.

THE COMMONWEALTH OF PUERTO RICO,
HON. MILAGROS RIVERA GUADARRAMA,
HON. LUIS SAAVEDRA SERRANO,
HON. CARLOS RIVERA MARTINEZ,
RESPONDENTS.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PUERTO RICO**

RESPONDENTS' BRIEF IN OPPOSITION

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TO THE HONORABLE COURT:

Respondents, Commonwealth of Puerto Rico and Puerto Rico judges, Hon. Milagros Rivera-Guadarrama, Hon. Luis Saavedra-Serrano and Hon. Carlos Rivera-Martinez most respectfully present before this Honorable Court their response to the petition for a writ of certiorari presented by petitioners. The petition seeks review of the judgment issued by the Supreme Court of the Commonwealth of Puerto Rico on July 8, 1992, unofficially reported as *El Vocero de Puerto Rico v. Commonwealth of Puerto Rico*, 92 J.T.S. 108.

Statement Of The Case

The present petition involves the constitutionality of Rule 23(c) of the Puerto Rico Rules of Criminal Procedure, Laws of P.R. Ann., tit. 34, App. II, R.23(c), insofar as it provides that a preliminary hearing in criminal cases where a felony is charged shall be private unless the defendant requests that it be made public. Petitioners have alleged that this provision violates their right of access to criminal proceedings under the First and Fourteenth Amendments to the Constitution of the United States.

Petitioner, El Vocero de Puerto Rico (hereinafter, "El Vocero"), is a newspaper of wide circulation in Puerto Rico. Petitioner, Jose A. Purcell (hereinafter "Purcell") is an employee of El Vocero who works as a reporter. On October 31, 1989, Purcell requested access to various preliminary hearings that were to be held on that day before the Puerto Rico District Court, San Juan Part. Respondent judges denied Purcell access to the preliminary hearings, pursuant to Rule 23(c).

As a consequence of respondents' refusal to allow Purcell access to the preliminary hearings, the petitioners filed suit for declaratory judgment and injunction before the Puerto Rico Superior Court, San Juan Part. In the complaint, petitioners alleged that the provision of Rule 23(c) which made preliminary hearings private was violative of their right of access to criminal proceedings under the First and Fourteenth Amendments to the Constitution of the United States. They requested a declaratory judgment to that effect and an order enjoining respondents from enforcing that particular provision of Rule 23(c). After various proceedings, the Superior Court issued a judgment on January 29, 1990, dismissing the complaint and upholding the constitutionality of the rule.

On March 2, 1990 petitioners appealed to the Puerto Rico Supreme Court. Their sole contention on appeal was that the questioned provision of Rule 23(c) was unconstitutional

because it violated their right of access to criminal proceedings. Their argument was based in its entirety on their allegation that the present case is essentially indistinguishable from the case of *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1982) (Also known as *Press Enterprise II*), in which this Court declared unconstitutional a statute of the State of California for violating the public's right of access to preliminary hearings in criminal cases. Petitioners contended that preliminary hearings in Puerto Rico are similar in their essential elements to those held in California, and that, therefore, the decision issued by this Court in *Press Enterprise II* was directly dispositive of the present case.

On July 8, 1992, the Puerto Rico Supreme Court issued an opinion affirming the judgment of the Superior Court. By a majority of 4 to 3, the Puerto Rico Supreme Court upheld the constitutionality of Rule 23(c). In a very extensive opinion, the court established that preliminary hearings, as held in Puerto Rico, were different from those held in California, and that therefore the opinion issued by this Court in *Press Enterprise II* was inapplicable to the present case. Afterwards, the court applied to Puerto Rico preliminary hearings the right-of-access analysis adopted by this Court in the case of *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982). The court concluded that there is no public right of access to preliminary hearings as conducted in Puerto Rico, and that the interest espoused by petitioners in having access to the preliminary hearings had to give way to the rights of a person charged with an offense to a fair trial and to preservation of his privacy and reputation.

Reasons For Denying The Petition

PRELIMINARY HEARINGS AS CONDUCTED IN PUERTO RICO ARE DISTINGUISHABLE FROM PRELIMINARY HEARINGS AS CONDUCTED IN CALIFORNIA AND THUS THE HOLDING IN *PRESS ENTERPRISE II* IS NOT DISPOSITIVE OF THE PRESENT CASE.

Upon a review of the arguments set forth in the petition, it appears that the entire basis for petitioners' allegations lies on their assumption that the present case is undistinguishable from the case of *Press Enterprise II*. Petitioners have concentrated their efforts in enumerating the similarities between preliminary hearings as held in Puerto Rico and those held in California. In order to adequately respond to the petition, it is therefore essential to discuss briefly the background of the preliminary hearing in Puerto Rico, as presented and interpreted by the Puerto Rico Supreme Court.

As the Puerto Rico Supreme Court explained in its opinion in the case of *El Vocero*, before 1901, the prevailing rules of criminal procedure had been incorporated from Spain in 1888. *El Vocero*, 92 J.T.S. at 9839. (App. Pet. Cert., p. 66) The rules, and for that matter, the entire penal code and procedure system, were changed in 1901, to substitute the Spanish system for the American one. *El Vocero*, 92 J.T.S. at 9840. (App. Pet. Cert. p. 676) For this purpose, the Criminal Code of California was adopted almost in its entirety in Puerto Rico, and became effective in July of 1902. *El Vocero*, supra. This code was revised in 1935, and again in 1963. It was not until the 1963 revision that the mechanism of the preliminary hearing was incorporated in the Puerto Rico Code.

Although the provisions of the Puerto Rico Code of Criminal Procedure adopted in 1902 were derived from California, the rules providing for preliminary hearings in that state were not adopted when the hearing was established in 1964. Instead, the preliminary hearing in Puerto Rico is

mostly derived from Rule 5(c) of the Federal Rules of Criminal Procedure. *El Vocero*, 92 J.T.S. at 9842. (App. Pet. Cert. 92-93); *People v. Rodriguez Aponte*, 116 D.P.R. 653, 662-663, 16 Official Translations 798, 810 (1985); *Hernandez Ortega v. Superior Court*, 102 D.P.R. 765, 767, 2 Official Translations 990, 992 (1974).

Rule 5(c) of the Federal Rules of Criminal Procedure, as it was in effect back in 1964,¹ provided a preliminary hearing for those persons accused of criminal offenses, when the U.S. Attorney did not use the grand jury to obtain an indictment. The mission of the hearing was an investigation by the court into the matter of whether there was probable cause for subjecting the accused to further proceedings. *Coleman v. Burnett*, 477 F. 2d 1187, 1199-1200 (D.C. Cir., 1973); Wright, *Federal Practice and Procedure*, Criminal 2nd, § 85, p. 178. The only purpose of these hearings is to "protect innocent persons from languishing in jail on totally baseless accusations". *United States v. Mulligan*, 520 F. 2d 1327, 1330 (6th Cir., 1975), cert. denied, 424 U.S. 919 (1976). The rule simply requires that enough information be presented to the magistrate to enable him to make the judgment that the charges filed against the defendant are not capricious, and are sufficiently supported to justify bringing into play further criminal proceedings. *Jaben v. United States*, 381 U.S. 214, 224-225 (1965), reh. denied, 382 U.S. 873 (1965).

In its general philosophy, the preliminary hearing as conducted in Puerto Rico, follows the model of Rule 5(c), in that its purpose is to screen out frivolous or unsubstantiated criminal charges. Should the charge be properly supported,

¹ This rule was amended in 1972 to conform it to the provisions of the Federal Magistrates Act of 1968, 18 U.S.C. § 3060. As a result of this amendment, what was formerly known as Rule 5(c) is now Rule 5.1, and covers the matter of preliminary hearings.

the prosecutor is then authorized to continue proceedings leading to a trial on the merits.

As it is performed today, the preliminary hearing in Puerto Rico admittedly bears various similarities with the preliminary hearing in California. In its opinion in the present case, the Puerto Rico Supreme Court recognized that both proceedings are presided by a magistrate, that the person may be represented by counsel, cross-examine the witness against him and present evidence on his behalf, and that the end purpose of both proceedings is similar. *El Vocero*, 92 J.T.S. at 9845 (App. Pet. Cert. 114-115). However, the Puerto Rico Supreme Court pointed out various differences between the preliminary hearings which tend to show that the preliminary hearing in Puerto Rico is more limited in scope than the one in California.

The first distinction lies in the burden of proof to be carried by the prosecutor at the preliminary hearing. Although the standard of proof in both jurisdictions bears the name of "probable cause", the meaning of that term is different for each jurisdiction. In California, sufficient or probable cause means "such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." *People v. Slaughter*, 35 Cal. 3d 629, 636-637; 677 P. 2d 854; 200 Cal. Rptr. 448 (Cal. 1984); *People v. Uhlemann*, 9 Cal. 3d 662, 667; 511 P. 2d 609; 108 Cal. Rptr. 657 (Cal. 1973). In Puerto Rico, however, strong suspicion need not be harbored against a person charged with a felony; it suffices that a *scintilla* of evidence be presented against him by the prosecutor. *El Vocero*, supra (App. Pet. Cert. 113). This means that the prosecutor must present some evidence showing that a crime has been committed and that the person committed it. *Vazquez Rosado v. Superior Court*, 100 D.P.R. 592, 594; 100 P.R.R. 591, 593 (1972). Once the prosecutor has complied with this burden, the magistrate should find that there is

probable cause to accuse the defendant, and the hearing ends. *El Vocero*, 92 J.T.S. at 9843 (App. Pet. Cert. p. 101-102).

Another difference between both proceedings, which the Puerto Rico Supreme Court considered to be substantial, is the applicability of the rules of evidence. In California, the rules of evidence apply to the preliminary hearing, so that the determination of the magistrate must be based upon admissible evidence. *McDaniel v. Superior Court for the County of San Diego*, 55 Cal. App. 3d 803, 805; 126 Cal. Rptr. 136 (Cal. App., 4th Dist., Div. 1, 1976); *People v. Conlon*, 24 Cal. Rptr. 219, 220 (Cal. App., 1st. Dist., Div. 1, 1962). In Puerto Rico, it has not yet been decided whether the evidence rules are applicable to the preliminary hearing. *El Vocero*, 92 J.T.S. at 9846 (App. Pet. Cert. 121-122); *People v. Esteves Rosado*, 110 D.P.R. 334, 336; 10 Official Translations 424, 427 (1980).

A third difference found by the Puerto Rico Supreme Court between the proceedings in both jurisdictions is that in California the charged person has a more extensive right to present evidence in his behalf. While in California the defendant is entitled to examination of all his witnesses, Cal. Penal Code § 866, in Puerto Rico, once the prosecutor has complied with his burden under Rule 23, the defendant has no right to present as his any witnesses announced but not presented by the People. *El Vocero*, 92 J.T.S. at 9845 (App. Pet. Cert. 116); *People v. Rodriguez Aponte*, 16 Official Translations at 816.

Yet another difference between both proceedings, as pointed out by the Puerto Rico Supreme Court, consists in the procedure for review of the findings of the magistrate. In this respect, under Puerto Rico law, should the magistrate find no probable cause for holding the defendant to answer, the prosecution may continue its investigation and present its evidence at a second preliminary hearing, held this time before a magistrate of the Superior Court. Rule 24 of the Puerto Rico Rules of Criminal Procedure, Laws of P.R. Ann., tit. 34, App. II, R. 24. The second preliminary hearing is not a review of the one

performed before the District Court, but an independent one where the prosecutor may present the same evidence he had presented before the District Court, or additional one. If this second time, the Superior Court finds no probable cause to accuse the defendant, the only recourse available is a petition for a writ of *certiorari* before the Puerto Rico appellate courts, solely on matters of law. *El Vocero*, 92 J.T.S. at 9844-9845 (App. Pet. Cert. 123-124); *People v. Cruz Justiniano*, 116 D.P.R. 28, 16 Official Translations 35, 39 (1984). If appeal is unavailing the case is dismissed, the prosecutor may not present again these charges against the defendant based on the same evidence. *Cruz Justiniano*, *supra*.

In California, the procedure is different. If the magistrate finds no probable cause against the defendant, the prosecutor has various options open to him. He may either, 1) seek an indictment before a grand jury; 2) attempt to present his evidence again before another magistrate; or 3) seek appeal from the magistrate's determination, limited to questions of law. *People v. Uhlemann*, 9 Cal. 3d at 666. Even an unfavorable decision on appeal does not prevent the People of California from future prosecution of the same offense. *Uhlemann*, *supra*.

In its opinion the Puerto Rico Supreme Court concluded that the preliminary hearing under Rule 23(c), unlike that of California, is of a very preliminary nature. The court determined that it is merely an investigatory hearing in which the prosecution must show that it has mustered enough evidence to justify further proceedings against the defendant. The burden of the People at this stage is very light, and particularly, lighter than that in California, where evidence enough to raise a strong suspicion as to the defendant's guilt upon an ordinary person is required. This appreciation is supported by (1) the limited role played by the rules of evidence in the Puerto Rico proceeding, (2) the limitations upon the right of the defendant to present evidence at the hearing and, (3) the different process for review of the magistrate's determination. In all of these aspects the preliminary hearing in Puerto Rico

differs from that of California. Further, the court took into account that, contrary to California, Puerto Rico is a compact insular community. As such, the entire Puerto Rico community is highly susceptible to the impact of the local media. In turn, this increases substantially the damage that adverse publicity at the preliminary hearing stage may cause to a defendant. Thus, the Puerto Rico Supreme Court concluded that the opinion issued by this Honorable Court in *Press Enterprise II* was not controlling. Respondents submit, most respectfully, that there is a fair and reasonable basis for the conclusion reached by the Puerto Rico Supreme Court.

Conclusion

It is respectfully requested that this Honorable Court take cognizance of the above in determining whether to grant the petition of certiorari.

Respectfully submitted,

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